IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Ramvilas **vs.** Surya Prakash

S.B. Civil Second Appeal No.69/1984 against the judgment and decree dated 26.3.1984 passed by the District Judge, Pali in Civil Appeal Decree No. 9/1983.

Date of Judgment: February 24, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr. Madhu Sudan Narain Bhatt, for the appellant.
Mr. M.S.Singhvi & Mr. Rajat Dave for the respondent.

BY THE COURT:

Detail facts of the case are not relevant for the purpose of deciding this appeal in view of the fact that the trial court granted decree for prohibitory injunction only against the appellant-defendant and refused the decree for mandatory injunction for demolition of the structure which was raised by the defendant. The trial court's decree dated 3.1.1983 was challenged by the defendant-appellant by preferring appeal which was dismissed by the first appellate court by judgment and decree dated 26.3.1984.

Brief facts of the case relevant for the purpose of deciding this appeal are that the plaintiff filed the suit for permanent injunction and

particularly for seeking injunction with respect to a wall, which according to the plaintiff was of the plaintiff, whereas the defendant claimed that the said wall belongs to the defendant. The trial court rejected the contention of both the parties about the exclusive ownership of the wall and declared the wall in question to be a joint wall. The trial court heavily relied upon the site inspection report prepared by the court itself after site inspection with the consent of the parties and in the presence of the learned counsel for the parties also. The learned counsel for the appellant vehemently submitted that the plaintiff came with a positive case that he is the owner of the wall and there is no pleading even in alternate that in case the plaintiff failed to prove the wall of his own then the same is joint one. Not only this but the plaintiff in his own statement before the trial court specifically admitted that he does not know when the wall was constructed by the defendant. According to the defendant's statement, the plaintiff virtually admitted the wall to be of defendant. It is also submitted that the court had no jurisdiction to travel beyond the pleadings. The court also had no jurisdiction to grant relief which has not been claimed nor the court had jurisdiction to declare the wall as joint wall which was not the case of any of the parties. Following substantial question of law was framed on 23.10.1984 while admitting this appeal:-

> "*(1) Whether the trial court and the first appellate court were in error in raising a presumption about the*

disputed wall being joint of the parties ignoring and over-looking the pleadings of the parties and the evidence led by them."

According to the learned counsel for the appellant, the Commissioner's report cannot be the sole basis for passing any decree. The Commissioner's report can be used as corroborative piece of evidence. In this case said Commissioner's report was used as substantive piece of evidence, therefore, also the court has committed serious illegality. It is also submitted that the plaintiff failed to produce the evidence about the ownership of the wall. The plaintiff could have produced the *Patta and* he could have produced the expert person who could have set the *Patta*.

The learned counsel for the respondent submits that the trial court as well as the first appellate court had decided the suit on the basis of the evidence available on record as well as after taking note of the all surrounding facts including the preponderance of the probabilities. It is also submitted that it is not a case of granting relief beyond the pleadings or relief which has not been claimed or a relief for which there is no evidence.

I considered the submissions of the learned counsel for the parties and perused the record as well as the Commissioner's report also.

It is true that the plaintiff filed the suit with a specific plea that

the wall in between the two houses is his own wall and the defendant specifically rebutted this fact with positive assertion that the wall belongs to the defendant. It will be worthwhile to mention here that the plaintiff in his statement before the trial court, in examination-in-chief, stated that when the *Patta* was set, he found that the defendant encroached the plaintiff's land and thereafter, the plaintiff stated that the wall which is in between the houses of the plaintiff and the defendant, when this wall was constructed by Ramvilas(defendant), he does not know. This statement is heavily relied upon by the learned counsel for the appellant to say that by this, the plaintiff admitted that the wall was constructed by the defendant. According to the learned counsel for the appellant, in cross-examination also the plaintiff further stated about the angle of the wall which also suggests only that wall would be of defendant alone. Defendant's case stands proved by the evidence of plaintiff himself.

The argument of the leaned counsel for the appellant is because of picking up some portion from plaintiff's statement and based on incomplete reading of plaintiff's statement and by ignoring the statement of D.W.1-Ramvilas, who in his statement before the trial court itself, in so many words, admitted that he did not construct the wall. In his statement, the defendant categorically stated that the wall between the two houses was in existence since the time of their

ancestors, therefore, it is clear from the statement of D.W.-1 Ramvilas defendant himself that he did not construct the wall and in the light of that, the statement of the plaintiff referred above cannot be read to mean as suggested by the learned counsel for the appellant. The learned counsel for the appellant further missed to read the first line of the cross-examination where the plaintiff clearly stated that his source of knowledge is his mother. Therefore, it is clear that neither the plaintiff nor the defendant were knowing who constructed the wall and when actually the wall was constructed. In these circumstances, the evidence of the other witnesses of the plaintiff and the defendant are not in any better position and there are no direct evidence of construction of the wall by either of the parties. The trial court in these facts and circumstances,on request and with the assistance of both the advocates of both the parties, rightly inspected the site. The site inspection report was never challenged by any of the parties. The site inspection report is in detail and is running in several pages giving minutes details which shows that the wall is not a plain and simple wall but the wall has several windows (*Aale)* and further steps of stairs and other structure. The nature of the wall itself clearly demonstrates that it can only be joint wall otherwise there was no reason for constructing a wall by one person providing enmities for other person. In these circumstances, the two courts below rightly concluded that the wall is joint one.

So far as the contention of the learned counsel for the appellant that by this, the courts below travelled beyond the pleadings is concerned, is mentioned just for rejection only. The civil court decides the suit on the basis of the evidence on record but not bereft of all other circumstances. The contention of the learned counsel for the appellant that once the plaintiff came with a case that the wall was belonging to him and he failed to prove that the wall to be his own then the only option available with the court was to dismiss the suit of the plaintiff in relation to the wall and the court could not have declared the wall to be common. The argument of the learned counsel for the appellant ignored the fact that even in a case where larger relief has been claimed by the plaintiff and he is found not entitled for the said relief, a lesser relief can be granted. The plaintiff's claim for entire wall was declined by the two courts below but the lesser relief of having share in the wall was declared by the two courts below which is permissible in law and was rightly allowed to the plaintiff by the two courts below. It cannot be said that in case where one party claims entire property and court reaches to the conclusion that he has share in the property, the court is required to dismiss the entire claim and the court cannot grant declaration of the share in the property. In such circumstances, there may be evidence of the plaintiff to the effect that the entire property belongs to him and there may not be any evidence

of lesser share, but the totality of the facts if warrants for grant of decree for lesser share and will do the justice, the court can and should grant such relief. In this case also when the plaintiff and defendant both had no knowledge when the wall was constructed and who constructed the wall, they might have proceeded on wrong assumption or on wrong information or out of their zeal take entire wall but that does not disentitle them from a reasonable equitable relief.

So far as the contention of the learned counsel for the appellant that the court has presumed the wall to be common wall and that presumption is not based on evidence is concerned, it is suffice to say that apart from the reasons given above where lesser relief can be granted by the court, the evidence in the form of Commissioner's report may be a piece of corroborative evidence but in this case, is not contrary to any evidence available on record. It only explains the nature of the property which is involved in the suit. Therefore, the Commissioner's report also explained the statement of the plaintiff and the defendant, which also suggests that the wall is common and hence it is not a case of drawing presumption but it is a case of decision on positive evidence about the common wall.

In view of the above, the appeal has no merit and hence the same is hereby dismissed.

(PRAKASH TATIA),J.

mlt.